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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK MARANO SULLIVAN, Defendant and Appellant.	A144708 (Sonoma County Super. Ct. No. SCR593297)

This is an appeal by defendant Frank Marano Sullivan of a trial court order denying his petition for resentencing under Penal Code section 1170.18[1] that is before this court for the second time. Defendant was charged with numerous felony counts after entering into the employee break rooms of several commercial establishments in Sonoma County during business hours, usually by posing as a fire inspector, and stealing personal items of varying monetary values, most not exceeding $950.[2] (*People v. Sullivan* (Oct. 31, 2017, A144708) [nonpub. opn.], at pp. 2–4.) Pursuant to a negotiated disposition, defendant pled guilty to eight felony counts of second degree burglary, admitted one prior serious felony conviction, and was sentenced to 15 years and four months. (*Ibid.*)

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1 All statutory references are to the Penal Code unless otherwise stated.

2 Among the personal items stolen during these incidents were credit or debit cards that defendant subsequently used to withdraw cash and/or purchase items at other commercial establishments. (*People v. Sullivan* (Oct. 31, 2017, A144708) [nonpub. opn.], at pp. 2-3.) A more complete recitation of the facts in this case can be found in our previous opinion. (*Id*. at pp. 1-7.)

In 2014, after defendant's sentencing, California voters approved Proposition 47, the Safe Neighborhoods and Schools Act of 2014, which reclassified as misdemeanors certain drug-related and theft-related crimes. Proposition 47 also created section 1170.18 as a new provision permitting a defendant previously convicted of a reclassified crime to petition to have his or her felony conviction resentenced or redesignated as a misdemeanor.

Defendant thereafter filed his petition for resentencing, seeking to have his felony second degree burglary offenses recharacterized as misdemeanor shoplifting. Denying his petition, the trial court found defendant stole personal property from employees in the employee-only areas of commercial establishments rather than retail property and, as such, was properly sentenced for felony offenses. (*People v. Sullivan* (Oct. 31, 2017, A144708) [nonpub. opn.], at p. 5.)

In the nonpublished decision filed October 31, 2017, this court reversed the trial court's order and remanded to the court to determine whether the value of the stolen property exceeded $950 with respect to each count and whether defendant's resentencing would create an unreasonable risk of danger to public safety. We held defendant would have the right to have his felony burglary conviction reduced to misdemeanor shoplifting or petty theft if the trial court determined, for the particular offense, that neither of these conditions was met. (*People v. Sullivan* (Oct. 31, 2017, A144708) [nonpub. opn.], at pp. 12–13.)

The People filed a petition for review, which the California Supreme Court granted pending resolution of a case presenting essentially the same legal issue, *People v. Colbert,* S238954. On January 24, 2019, the California Supreme Court issued its decision, *People v. Colbert* (2019) 6 Cal.5th 596 (*Colbert*), and then transferred this case back to us for reconsideration. In *Colbert*, the high court concluded "entering an interior room [of a store] that is objectively identifiable as off-limits to the public with intent to steal therefrom is not shoplifting, but instead remains punishable as burglary." (*Id*. at p. 598.)

The parties have now filed supplemental briefs in this court in which they agree, as do we, that the proper recourse in light of the *Colbert* decision is to remand this matter to the trial court to resolve in the first instance a factual issue not previously decided (and thus not in the record on appeal) – whether, for each count, the item at issue was stolen from "an interior room that is objectively identifiable as off-limits to the public[.]" (*Colbert*, *supra*, 6 Cal.5th at p. 598.) If the answer to this question is "no," defendant may be eligible for resentencing depending on whether the trial court also resolves in the negative the two additional questions, set forth in our previous opinion, of whether the stolen item for a particular count exceeds $950 in value, and whether defendant's resentencing would create an unreasonable risk of danger to public safety. (*People v. Sullivan* (Oct. 31, 2017, A144708) [nonpub. opn.].)

Accordingly, we remand this matter to the trial court for additional proceedings to determine whether, in light of *Colbert* and this opinion, defendant has satisfied the necessary conditions for resentencing under section 1170.18 with respect to counts 1, 2, 3, 4 and 12.[3]

DISPOSITION

This matter is remanded to the trial court for further proceedings to determine defendants' eligibility for resentencing on counts 1, 2, 3, 4 and 12 under section 1170.18 in accordance with the opinions reached herein.

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[3] Defendant concedes with respect to counts 5, 7, and 11 that the value of the stolen property exceeds $950. Accordingly, defendant is not eligible for resentencing under Proposition 47 on those counts. (See § 459.5, subd. (a) ["shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)"].)

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Petrou, J.

WE CONCUR:

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Siggins, P. J.

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Fujisaki, J.

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